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THE UNDERSIGNED ATTORNEY HEREBY CERTIFIES: ENSURING REASONABLE CASELOADS FOR WASHINGTON DEFENDERS AND CLIENTS

Andrea Woods[*]

The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.
—Judge Robert S. Lasnik[1]

INTRODUCTION

Santos Rivas was appointed a defense attorney in Yakima County in August 1999.[2] About a month later, he appeared in court.[3] Upon arrival, Rivas discovered that his public defender, Steven Michels, was now presiding over his case as judge.[4] Then-Judge Michels persuaded Rivas not only to fire Michels as his attorney, but also to plead guilty to all charges.[5] Judge Michels did not inform Rivas of his right to appoint new counsel and pressured his former client to proceed without an attorney in his guilty plea.[6]

In 1997, Keith Roberts faced criminal charges in Grant County Superior Court.[7] Unable to afford his own attorney, he was appointed one.[8] His attorney, Guillermo Romero, failed to object when the

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[*] The author has worked previously with the Alaska Public Defender Agency, the Innocence Project Northwest, and the Metropolitan Public Defender in Portland, Oregon.

1. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *4 (W.D. Wash. Dec. 4, 2013).

2. *In re* Disciplinary Proceeding Against Michels, 150 Wash. 2d 159, 167–68, 75 P.3d 950, 954 (2003) (discussing City of Toppenish v. Rivas, Nos. C00006564, C00006565, C00006566, (Toppenish Mun. Ct. Sept. 13, 1999)).

3. *Id.* at 168, 75 P.3d at 954.

4. *Id.*

5. *See id.*

6. *See id.* at 168, 75 P.3d at 954–55.

7. *See generally* State v. Roberts, No. 16586-8-III, 1999 WL 543835 (Wash. Ct. App. July 27, 1999).

8. *See In re* Disciplinary Proceeding Against Romero, 152 Wash. 2d 124, 127, 94 P.3d 939, 940

prosecution compared Roberts to Hitler.[9] Romero misled Roberts' mother into paying hundreds of dollars.[10] Roberts is required to register as a level-III sex offender.[11] His appointed counsel, Guillermo Romero, has since been disbarred.[12]

Joseph Jerome Wilbur faced numerous criminal charges in Mount Vernon between 2006 and 2009.[13] His public defender, Richard Sybrandy, never spoke with Wilbur unless they were at a court hearing.[14] Sybrandy failed to respond to his client's notes and phone calls, presenting Wilbur with only one option: to plead guilty.[15] During that time, Mount Vernon and Burlington relied on two attorneys, Richard Sybrandy and Morgan Witt, for the cities' entire misdemeanor defense caseloads.[16] Sybrandy and Witt were responsible for approximately 2100 cases in 2010, while additionally maintaining private practices.[17]

Fifty years have passed since the Supreme Court decided *Gideon v. Wainwright*.[18] *Gideon* and its progeny established that indigent persons accused of crimes are entitled to the effective assistance of counsel under the Sixth Amendment.[19] Yet today, criminal defendants often face charges with little help from the attorneys appointed to defend them.[20]

(2004).

9. *Roberts*, 1999 WL 543835, at *11–12.

10. *In re Romero*, 152 Wash. 2d at 127–128, 94 P.3d at 940–41.

11. *See* Ken Armstrong et al., *For Some, Free Counsel Comes at a High Cost*, SEATTLE TIMES (Apr. 4, 2004), http://seattletimes.com/news/local/unequaldefense/stories/one; National Sex Offender Search, U.S. DEP'T OF JUSTICE, http://www.nsopw.gov/en-US/Search (search for "Keith Roberts" in Grant County).

12. *See In re Romero*, 152 Wash. 2d 124, 94 P.3d 939.

13. Declaration of Plaintiff at 2, Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2012 WL 600727 (W.D. Wash. Dec. 4, 2013).

14. *Id.*

15. *Id.*

16. Plaintiffs' Motion for Summary Judgment at 3, Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2012 WL 600727 (W.D. Wash. Dec. 4, 2013) (Sybrandy and Witt handled all of the cases in these jurisdictions except when an actual conflict of interest existed).

17. *Id.* at 4.

18. 372 U.S. 335 (1963).

19. *See generally* Lafler v. Cooper, __U.S.__, 132 S. Ct. 1376 (2012) (acknowledging that the right to effective counsel includes effective representation in pre-trial matters, including plea bargaining); Missouri v. Frye, __U.S.__, 132 S. Ct. 1399 (2012) (same); Strickland v. Washington, 466 U.S. 668 (1984) (holding that appointed counsel must be "effective"); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the right to counsel extends to those facing misdemeanor charges for which a term of imprisonment is possible).

20. *See, e.g.*, Adele Bernhard, Robert C. Boruchowitz & Norman L. Reimer, *Foreword* to JOEL M. SCHUMM, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 5 (Am.

Roberts and Rivas are two examples of clients who received representation that fell short of the caliber of defense anticipated by the *Gideon* Court.[21] Across the nation, systemic factors—including but not limited to the limitations inherent in public funding, caseload management, and a lack of oversight—contribute to failures in delivering the poor person's right to a fair trial.[22]

Washington State is no exception. For example, a King County defendant facing felony charges receives appointed counsel whose caseload would enable her to spend, on average, 13.9 hours[23] devoted to his defense.[24] In contrast, defendants in Cowlitz County are appointed counsel who can devote only about 3.6 hours to their defense.[25] In other words, persons charged with crimes demanding a similarly nuanced defense, would be assisted to very different degrees by virtue of their geography: one person's attorney could assess, negotiate, and investigate the case against her client while another defendant would in all likelihood be rushed into a plea deal.[26] Lisa Tabbut, a former Cowlitz

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Bar Ass'n 2012).

21. *See Gideon*, 372 U.S. at 345 (anticipating defense counsel that "has . . . skill in the science of law," is capable of determining the viability of claims against the defendant, and understands the rules of evidence (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932))).

22. *See* ACLU OF WASH., THE UNFULFILLED PROMISE OF *GIDEON*: WASHINGTON'S FLAWED SYSTEM OF PUBLIC DEFENSE FOR THE POOR 8–9, 10–11 (2004) [hereinafter UNFULFILLED PROMISE].

23. For purposes of comparison, calculations for the hourly figures in this section are based on an assumption that there are 2,087 work hours per year. This is the number used to determine federal employees' pay rates, although many public defense attorneys may work more or fewer than 2,087 hours annually. *See* Letter from Milton J. Socolow, Acting Comptroller Gen. of the U.S., to Hon. Mary Rose Oakar, Chair, Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service, U.S.H.R., at 3 (Aug. 26, 1981) (on file with author) (recommending, as an option, that Congress calculate based on 2,087 work hours per year as the average number of work hours over a 28-year calendar cycle), *codified at* 5 U.S.C. § 5504 (2012).

24. King County caps felony caseloads at 150 per year. *See* UNFULFILLED PROMISE, *supra* note 22, at 14; *see also* WASH. DEFENDER ASS'N, STANDARDS FOR PUBLIC DEFENSE SERVICES 10 (2007), *available at* http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense (last visited Jan. 15, 2014); Motion for Leave to File Amicus Curiae Brief by The Washington Defender Association, Jerome Joseph Wilbur v. City of Mount Vernon, No. 11-1100RSL, at *2–3 (providing history of WDA standards and confirming that a relevant version was published in 2007).

25. Ken Armstrong & Justin Mayo, *Frustrated Attorney: 'You Just Can't Help People*,' SEATTLE TIMES (Apr. 6, 2004), http://seattletimes.com/news/local/unequaldefense/stories/three (Lisa Tabbut's annual 587 cases is used as an illustration).

26. *See* ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 31–34 (2009) (providing statistics and interviews regarding the tendency to "meet and plead" clients. Of New York City's misdemeanor caseload in 2000, 70% of cases were resolved with guilty pleas at the defense attorney's first appearance—often in no more than ten minutes total—in a process described by Judge Joseph

County public defender, described managing her annual caseload of 276 dependency cases, 295 juvenile cases, and 16 criminal appeals as "malpractice per se."[27] In Mount Vernon and Burlington, the excessive caseloads of defense attorneys "systemically deprived [defendants] of the assistance of counsel at critical stages of the prosecution," according to United States District Court Judge Robert Lasnik.[28] While some defendants face criminal charges without legal guidance at all,[29] this Comment is focused on those defendants who receive appointed counsel burdened by an excessive caseload. In order to ensure an effective defense, Washington defenders must have the time and resources to devote to adequate investigation, counseling, negotiation, and preparation—a feat not possible in the few hours available to public defenders in some counties.[30] Though the *Gideon* Court did not identify specific caseload caps, the evolution of public defense in Washington—and throughout the country—has made such restrictions necessary to prevent public defense from being compromised by either the inherent limitations on overworked attorneys or, even worse, by for-profit gamesmanship.[31]

To address these issues, the Washington State Supreme Court issued a

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Bellacosa as "meet 'em, greet 'em, and plead 'em." During an observation of the Lynnwood, Washington, Municipal Court, two contract attorneys advised as many as 132 clients in three and a half hours—just over three minutes for each client to meet with counsel, assuming each attorney handled 66 cases. Another Washington defender told reporters that out of his annual caseload of 900 misdemeanors, only nine, or one percent, were taken to trial. While beyond the scope of this Comment, this problem is exacerbated by the difficulty of meeting bail; defendants who cannot afford to bail out of custody are, generally, more likely to seek out and accept rushed plea deals in this manner.).

27. Armstrong & Mayo, *supra* note 25.

28. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *2 (W.D. Wash. Dec. 4, 2013). The U.S. Department of Justice filed a Statement of Interest in the outcome of this litigation. *See* Statement of Interest of the United States at 3, *Wilbur*, 2013 WL 6275319 ("The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright* . . . ."). The *Wilbur* case is discussed further *infra* Part III.D.

29. *See, e.g.*, *In re* Disciplinary Proceeding Against Michels, 150 Wash. 2d 159, 167–68, 75 P.3d 950, 954 (2003) (discussing City of Toppenish v. Rivas, Nos. C00006564, C00006565, C00006566, (Toppenish Mun. Ct. Sept. 13, 1999)) (Santos Rivas was urged by his former defense attorney to plead guilty unrepresented). While it is beyond the scope of this Comment, a recent piece of proposed legislation would make the determination of indigency for the purposes of receiving a public defender even more difficult by amending RCW section 10.101.020(2). *See also* S.B. 5020, 63d Leg., Reg. Sess. (Wash. 2013).

30. *See* Letter from Milton J. Socolow, *supra* note 23 (addressing the time calculations for defense caseloads).

31. *See infra* Part I.A.

historic order on June 15, 2012.[32] The order requires appointed defense attorneys to certify that they comply with requirements set by the Court.[33] To comply with these requirements, attorneys must be specifically qualified to handle their cases, must have access to an office, and—most controversially—must limit their annual caseload.[34] The court rule creating mandatory Standards for Indigent Defense[35] (hereinafter "the Standards"), except for Standard 3.4 pertaining to caseload limits, originally became effective on January 1, 2013.[36] Many Washington trial courts have already conducted the attorney certification process.[37] As of October 1, 2013, attorneys must certify compliance with the Standards, save Standard 3.4 which will not take statewide effect until January of 2015.[38] Whether or not enforcement for noncompliance will prove effective is one of the potential weaknesses of the Standards.[39]

The Standards governing Washington's public defenders[40] represent a significant reform aimed at protecting an important constitutional right

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32. *See In the Matter of the Adoption of New Standards for Indigent Defense and Certification of Compliance*, Order No. 25700-A-1004 (Wash. June 15, 2012) [hereinafter *Adoption of New Standards*].

33. This certification requirement is codified in amended WASH. SUPER. CT. CRIM. R. 3.1(d)(4), WASH. CRIM. R. CT. LTD. JURIS. 3.1(d)(4), and WASH. JUV. CT. R. 9.2(d)(1).

34. *See* WASH. STATE OFFICE OF PUB. DEF., 2011 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 10, *available at* http://www.opd.wa.gov/documents/0060-2011_StatusReport.pdf (last visited Jan. 16, 2014) [hereinafter OPD REPORT] ("Standard 3.4 . . . proved to be the most critical and controversial issue considered for implementation").

35. The author uses the term "Standards" to refer only to those Standards for Indigent Defense adopted by the State Supreme Court in June 2012. Other versions are referred to as "guidelines" or "best practices" to avoid confusion.

36. *See* WASH. SUPER. CT. CRIM. R. 3.1; WASH. CRIM. R. CT. LTD. JURIS. 3.1; WASH. JUV. CT. R. 9.2.

37. *See* OPD REPORT, *supra* note 34, at 9 (explaining how trial courts will oversee certification); E-mail from Ann Christian, Clark County Indigent Defense Coordinator, to author (Apr. 1, 2013, 4:01 PST) (on file with author).

38. *See Frequently Asked Questions Related to Implementation of the Standards for Indigent Defense as Adopted by the Washington Supreme Court*, WASH. STATE OFFICE OF PUB. DEF. (Sept. 30, 2013), http://www.opd.wa.gov/index.php/12-pd/129-faq-standards. The Court recently issued another order requiring OPD to conduct a time study in order to determine how misdemeanor cases should be weighted; the annual limits on caseload standards will thus become effective January 2015. The other requirements of the Standards must be certified as of October 1, 2013. *In the Matter of the Standards for Indigent Defense Implementation of CrR 3.1(d), JuCR 9.2(d), and CrRLJ 3.1(d)*, Order No. 25700-A-1016 (Wash. Apr. 8, 2013) [hereinafter *Indigent Defense Implementation*].

39. *See infra* Part IV.A.

40. The author uses the term "public defender" to apply to those in an organized public defender office, those accepting cases through individual appointment by the courts, and those in a contract with the courts to provide representation in a certain number of cases per year.

for our state's vulnerable citizens. This Comment provides the necessary introduction to the Standards and addresses skepticism on the part of current practitioners and elected officials. Cooperation among defense attorneys, local governments, and the courts could ensure the Standards' success and—in turn—a better system of public defense for attorneys and defendants alike.[41]

Part I of this Comment introduces the reader to the new Standards. Part II offers an overview of common critiques of the Washington State Supreme Court Standards that were voiced by practitioners prior to the Standards' issuance. Part III explains what has happened since the Standards have become effective—whether the critics' warnings or the believers' hopes have come to pass. Part IV identifies problems with the Standards. Finally, Part V suggests potential improvements in light of those problems: creating a meaningful enforcement mechanism, locating adequate funding for public defense, and weighting cases appropriately.

I. THE STANDARDS FOR INDIGENT DEFENSE

A. The Structure of Public Defense in Washington Is Decentralized

The first public defender offices in Washington date back to the 1960s.[42] Funding and oversight for Washington's public defense system is delegated to local jurisdictions, meaning that public defense is run primarily at the county level.[43] However, local control of public defense is not a gold standard: 22 states employ a state-implemented system with

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41. And, like many other reforms, the existence of criticism is not surprising. *See, e.g.*, Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 294–95 (1986) (pointing out the criticisms of the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 584 (2009) (noting the initial unpopularity of criminal reforms to redefine rape); Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1329 (2006) (mentioning critical views of movements towards desegregation and interracial marriage rights); *see infra* Part II (discussing criticisms of the Standards).

42. *See* Robert C. Boruchowitz, *State Supreme Court Issues Historic Order on Defense Standards*, 31 KING CNTY. BAR ASS'N BAR BULL. 1, 10 (2012); *see also* Marc Boman, WSBA Council on Public Defense, Presentation to Washington Legislative Staff Academy, at 3 (Oct. 4, 2012) [hereinafter Boman]. By 1968, problems in the delivery of indigent defense for persons accused of misdemeanors had already been identified by Washington scholars. *See* John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 685 (1968).

43. *See* OPD REPORT, *supra* note 34, at 8 (describing how OPD administers funds to counties and cities); DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 fig.1 (2007).

one office providing oversight.[44] State-based public defender programs appear on the whole to provide more resources, such as investigators, to their offices.[45]

There are three methods through which an attorney may find herself practicing public defense in Washington. First, an attorney might work in an organized office of public defense, a local government, or nonprofit organization.[46] Second, a private attorney may be assigned to a case by a trial court.[47] Third, a private attorney could have a contract with the local court system to represent a regular number of clients.[48] Depending on which category an attorney belongs to, the new Standards adopted by the Washington State Supreme Court may appear (at least from the individual attorney's perspective) to have more drastic implications.[49]

The majority[50] of Washington counties use a private contract system for their public defenders, thus falling into the second or third category mentioned above.[51] These public defenders share a number of characteristics. Most maintain a private practice while defending indigent clients.[52] Many have ignored caseload limit suggestions—despite a statute encouraging local jurisdictions to adopt caseload limits[53] for indigent defense attorneys, those limits were only guidelines

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44. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, STATE PUBLIC DEFENDER PROGRAMS, 2007 at 1 (2007).

45. *Compare* FAROLE & LANGTON, *supra* note 43, at 1, *with* FAROLE & LANGTON, *supra* note 44, at 1, 14.

46. FAROLE & LANGTON, *supra* note 43, at 3; *see also* WASH. STATE OFFICE OF PUB. DEF., 2012 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 11, *available at* http://www.opd.wa.gov/documents/0095-2012_Status_Report.pdf (last visited Feb. 2, 2014) (map demonstrating that Washington counties may use one of the listed types of appointed counsel).

47. FAROLE & LANGTON, *supra* note 43, at 3.

48. *Id.*

49. For example, before the Standards were implemented, the nonprofit public defense offices in King County already followed the same caseload limits for their public defenders. *See* UNFULFILLED PROMISE, *supra* note 22, at 18. Spokane County's office of public defense, too, implemented guidelines for caseload limits and compensation before the Standards created a mandate. *See* SPOKANE CNTY., STANDARDS FOR THE DELIVERY OF INDIGENT DEFENDER SERVICES (2012), *available at* http://www.spokanecounty.org/pubdefender/content.aspx?c=1927 (last visited Feb. 13, 2013). The Standards represent a mere administrative change, annual certification, for these persons.

50. Twenty-four of thirty-nine. UNFULFILLED PROMISE, *supra* note 22, at 17.

51. *See id.*

52. *Id.* at 5.

53. WASH. REV. CODE § 10.101.030 (1989) ("The standards endorsed by the Washington state bar association for the provision of public defense services *may* serve as guidelines . . . .") (emphasis added).

and lacked a meaningful enforcement mechanism.[54] As of 2003, only King County had incorporated the caseload limits suggested—but not required—by state statute and the Washington State Bar Association (WSBA).[55]

The use of flat-fee contracts in Washington has engendered perverse incentives for some public defenders. For example, Grant County previously had a $500,000 contract for the total of its criminal defense representation.[56] This created conflicting motivations for public defender Thomas Earl, who administered the indigent defense contract: incentives to (1) handle as many of Grant County's cases as he could in order to retain as much of that $500,000 as possible, and (2) hire additional attorneys to handle overflow cases who would work for the least compensation rather than those most qualified.[57] His failure to adequately represent clients, coupled with financial dishonesty, eventually led to Earl's disbarment.[58] Similar conduct—arguably also motivated by a flat-fee contract system—by longtime Grant County Public Defender Guillermo Romero resulted in his disbarment as well.[59]

Flat-fee contracts, aggravated by a lack of caseload limits, had negative effects on attorneys. Even in counties with no overt corruption, the use of flat fees resulted in drastic under-compensation of defense attorneys.[60] For example, Cowlitz County Public Defender Lisa Tabbut received approximately $150 per case while doing the work of two or three full-time defenders.[61] In light of the examples of Earl and Tabbut,[62]

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54. UNFULFILLED PROMISE, *supra* note 22, at 7–8.

55. *Id.* at 18. One of the additional attorneys hired by Earl was Guillermo Romero, discussed in the Introduction. *See also* Ken Armstrong et al., *Attorney Profited, but His Clients Lost*, SEATTLE TIMES (Apr. 5, 2004), http://seattletimes.com/news/local/unequaldefense/stories/two/.

56. Armstrong et al., *supra* note 55.

57. *See id.*; *see also In re* Disciplinary Proceeding Against Romero, 152 Wash. 2d. 124, 128–29, 94 P.3d 939, 941 (2004) (Guillermo Romero, discussed in the Introduction, *supra*, was one of the employees hired by Thomas Earl).

58. *See Discipline Notice – Thomas Jay Earl*, WASH. STATE BAR ASS'N, https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=594 (last visited Jan. 16, 2014).

59. *In re* Disciplinary Proceeding Against Romero, 152 Wash. 2d 124, 128, 94 P.3d 939, 940–41 (2004). The reader may at first glance believe disbarment signals that the system is working. This logic, however, is misguided for two reasons. First, disbarment is a rare sanction. *See* WASH. STATE BAR ASS'N, 2011 LAWYER DISCIPLINE SYSTEM ANNUAL REPORT 9, 23 (2011) (in 2011, the WSBA received 2156 grievances but there were only 19 disbarments). Second, these disciplinary procedures come too late to provide poor defendants with their constitutional right to effective assistance of counsel.

60. *See* Armstrong & Mayo, *supra* note 25.

61. *Id.*

it comes as no surprise that mandated Standards for Indigent Defense had been in the works for years.[63]

B. Before the Standards: Attempted Reforms Fell Short

Though voluntary guidelines existed[64] before the Washington State Supreme Court implemented the Standards, those guidelines were rarely followed.[65] All told, the Standards were developed over nearly thirty years, beginning with reform efforts in King County and developed by the Washington Defender Association.[66]

In 1982, in response to local concern[67] that the Seattle Municipal Court issued no more than "supermarket justice," the King County Bar Association (KCBA) set guidelines for its public defense attorneys, including case limit guidelines.[68] As a report described the Seattle Municipal Court, "Court officials inform defendants of their rights over loudspeakers. 'The need to "process cases" has clearly taken precedence over the obligation to [dispense] justice.'"[69]

In 1984, the Washington Defender Association published its own best practices, developed from those set forth by the KCBA, and the WSBA endorsed them.[70] These guidelines set forth annual limits on public defense attorneys' caseloads.[71] Earlier indigent defense guidelines included similar provisions to the recently enacted standards, including provisions for attorney compensation and caseload caps.[72] However, they lacked an enforcement mechanism and were treated as best

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62. Even in counties with assigned offices of public defense or where the court assigns attorneys to cases one-by-one, the consistency and quality control provided by the Standards still provide important protections and more careful oversight. *See, e.g.*, *Adoption of New Standards*, *supra* note 32 (The Standards' purpose is to effectuate "quality representation," defined as "the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.").

63. *See generally* Boman, *supra* note 42. Generally, other systems of public defender appointment came with more structure, with public defender agencies providing the most stability and oversight. *Id.* at 6.

64. *See, e.g.*, WASH. REV. CODE § 10.101.030 (2005).

65. *See generally* UNFULFILLED PROMISE, *supra* note 22.

66. *See* Boruchowitz, *supra* note 42, at 1, 10.

67. *Id.* at 1.

68. *Id.*

69. *Id.*

70. *See* Boman, *supra* note 42, at 3.

71. Boruchowitz, *supra* note 42, at 1, 10.

72. WASH. STATE BAR ASS'N, STANDARDS FOR INDIGENT DEFENSE SERVICES at 1, 4 (2011) (the WSBA's standards reference the Seattle-King County Standards that they draw upon).

practices rather than requirements.[73] As a result, no jurisdiction but King County followed these guidelines.[74]

The state legislature also made efforts to create standards. In 1989, the Legislature passed a statute[75] requiring local governments to create public defense guidelines. The statute provided that "[t]he standards endorsed by the Washington state bar association . . . *may* serve as guidelines to contracting authorities."[76] This language went easily ignored; it did not *require* local jurisdictions to follow the best practices set forth by the WSBA. As a result, most jurisdictions did not limit the annual caseloads of public defenders.[77]

Next, the Legislature created a statewide Office of Public Defense (OPD).[78] At first, the legislature tasked the OPD only with fulfilling the "powers, duties, and functions of the supreme court . . . pertaining to appellate indigent defense."[79] It was not until 2005 that the legislature gave the OPD the broader function it now serves: overseeing public defense funding and delivery statewide.[80]

These efforts to improve public defense were—not surprisingly—unsuccessful.[81] By 2004, Washington State was not meeting its obligation to ensure consistent and effective assistance of counsel to all of its citizens. That year, both the ACLU of Washington[82] and the Seattle Times[83] issued reports on the defects in Washington's indigent defense system. These reports exposed gaping holes in the delivery of effective assistance of counsel; many defendants were being hurriedly ushered through the justice system, often receiving no more than a rudimentary defense.[84] For example, the ACLU describes a Chelan

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73. *See* Boruchowitz, *supra* note 42, at 10.

74. *See* UNFULFILLED PROMISE, *supra* note 22, at 18.

75. Act of May 13, 1989, ch. 409 § 4, 1989 WASH. SESS. LAWS 2205, 2207–08 (codified as amended at WASH. REV. CODE § 10.101.030 (1989)).

76. *Id.* (emphasis added).

77. *See* UNFULFILLED PROMISE, *supra* note 22, at 18–19 (only King County adopted the WSBA limits, though Benton, Clark, Island, San Juan, and Snohomish Counties had some caseload limits by 2004).

78. *See* Act of March 28, 1996, ch. 221, 1996 WASH. SESS. LAWS 961 (codified as amended at WASH. REV. CODE § 2.70.050 (2005)).

79. *Id.* § 6(1) (codified as amended at WASH. REV. CODE § 2.70.050 (1996)).

80. *See* Act of May 4, 2005, ch. 282, 2005 WASH. SESS. LAWS 1052; *see also generally* WASH. STATE OFFICE OF PUB. DEF., *supra* note 46.

81. *See generally* UNFULFILLED PROMISE, *supra* note 22; Armstrong et al., *supra* note 11.

82. *See generally* UNFULFILLED PROMISE, *supra* note 22.

83. Armstrong et al., *supra* note 11; Armstrong & Mayo, *supra* note 25; Armstrong et al., *supra* note 55.

84. *See generally* UNFULFILLED PROMISE, *supra* note 22; Armstrong et al., *supra* note 11;

County defendant's plight:

> [T]he defense attorney failed to interview witnesses, failed to prepare for key hearings, failed to prepare defendants to testify and coerced a defendant to plead guilty to 23 counts of incest and child rape. When the defendant later obtained new counsel to challenge his guilty pleas, the prosecutor promptly conceded that the defendant had been deprived of effective assistance of counsel.[85]

The serious problems with public defense spurred the Washington legal community to action. In 2003, the WSBA Board of Governors established a Blue Ribbon Panel on Criminal Defense to study the public defense system.[86] The panel identified four major flaws with Washington's public defense delivery system: (1) it did not effectively limit annual caseloads; (2) it was inadequately funded; (3) it improperly utilized a flat-fee contract scheme; and (4) it lacked enforceability.[87] In light of the flaws identified by the Blue Ribbon Panel, the Legislature amended the statute regarding public defense standards, which had previously been ineffective,[88] in 2005: "The standards endorsed by the Washington state bar association . . . ~~may~~ *should* serve as guidelines to ~~contracting~~ *local legislative* authorities *in adopting standards*."[89] The WSBA also created a Council on Public Defense (CPD) to review and draft standards to be endorsed as per the statute's recommendation.[90] The CPD reviewed existing public defense guidelines, including those established by the Washington Defender Association in 1984.[91]

The Washington State Supreme Court moved the conversation forward in its 2010 decision, *State v. A.N.J.*,[92] where it addressed an

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Armstrong & Mayo, *supra* note 25; Armstrong et al., *supra* note 55.

85. UNFULFILLED PROMISE, *supra* note 22, at 6.

86. *Council on Public Defense*, WASH. STATE BAR ASS'N, http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Council-on-Public-Defense (last visited Jan. 17, 2014).

87. Boman, *supra* note 42, at 6.

88. *See generally* UNFULFILLED PROMISE, *supra* note 22.

89. Act of Apr. 22, 2005, ch. 157 § 2, 2005 WASH. SESS. LAWS 542–43 (codified at WASH. REV. CODE § 10.101.030 (2005)) (strikethrough indicating text removed and italics indicating text added).

90. WASH. STATE BAR ASS'N, *supra* note 86 (Council created to "implement the recommendations of the . . . Blue Ribbon Panel.").

91. The 1984 guidelines are substantially similar to the Standards adopted by the Supreme Court, providing guidance regarding attorney compensation, caseload, and administrative costs. WASH. DEFENDER ASS'N, *supra* note 24, at 1, 4, 10–12, 51.

92. 168 Wash. 2d 91, 225 P.3d 956 (2010).

ineffective assistance of counsel claim.[93] Criminal defendant A.N.J. entered a guilty plea to a first-degree child molestation charge—without understanding its severe consequences—when he was only 12 years old.[94] A.N.J.'s court-appointed defense attorney did not conduct a meaningful investigation or consult with experts, and A.N.J. was not advised of the ramifications of his guilty plea.[95] While *A.N.J.* did not directly relate to the formation of formal public defense standards, the Court's decision demonstrated its renewed interest in tackling the problem of over-burdened public defenders.[96] Though stopping short of mandating compliance with caseload standards to find a defender's representation effective, the Court indicated that compliance may be considered: "While we do not adopt the WDA *Standards for Public Defense Services*, we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel."[97] This language indicates that compliance with the new Standards may have a bearing on ineffective assistance of counsel claims in the future.[98]

C. The Washington State Supreme Court Created a Court Rule to Effectuate Compliance with Standards

Shortly after *A.N.J.*, the Washington State Supreme Court issued an order to regulate public defense attorneys.[99] Pursuant to its power over courts and attorneys, the Court enacted an identical amendment to three court rules. The amendment provides:

> Before appointing a lawyer for an indigent person or at the first appearance of the lawyer in the case, the court shall *require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services* to be approved by the Supreme Court.[100]

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93. *Id.* at 96, 225 P.3d at 959.

94. *Id.*

95. *Id.* at 96, 109, 225 P.3d at 959, 965.

96. *Id.* at 110, 225 P.3d at 965.

97. *Id.* at 110, 225 P.2d at 966.

98. *See id.*

99. Codified in amendments to WASH. SUPER. CT. CRIM. R. 3.1(d)(4) ("Right to and Assignment of Lawyer"), WASH. CRIM. R. CT. LTD. JURIS. 3.1(d)(4) ("Right to and Assignment of Lawyer"), and WASH. JUV. CT. R. 9.2(d)(1) ("Additional Right to Representation by Lawyer"); *see also Adoption of New Standards*, *supra* note 32.

100. WASH. SUPER. CT. CRIM. R. 3.1(d)(4); WASH. CRIM. R. CT. LTD. JURIS. 3.1(d)(4); WASH. JUV. CT. R. 9.2(d)(1) (emphasis added).

This amendment required the Court to approve a set of Standards for Indigent Defense, and the Court invited the WSBA's CPD to draft the new guidelines.[101] Members of the CPD looked to existing standards and other national surveys in order to create Washington's rules.[102] The Court ordered the standards be published for a three-month comment period to gather public feedback and promote transparency.[103] After the comment period some adjustments were made,[104] and the Court adopted final Standards in June 2012.[105]

D. Introduction to the Standards Adopted by the Court

The Standards add an administrative requirement for public defense attorneys: regular certification.[106] Because the Court may not regulate counties or cities—its rulemaking power is confined to attorneys and courts—the Standards are aimed at practitioners.[107] The Court has exclusive power to discipline and regulate members of the Washington Bar.[108]

No one may practice law in Washington State without complying with rules set forth by the Washington State Supreme Court.[109] A familiar area in which this power is exercised is the existence of a

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101. Boman, *supra* note 42, at 12; *see also Adoption of New Standards*, *supra* note 32, at 6 (discussing "related standards").

102. *See Adoption of New Standards*, *supra* note 32, at 6 (discussing "related standards").

103. *See Proposed Rules of Court – Published for Comment Only*, WASH. COURTS, http://www.courts.wa.gov/court_rules/?fa=court_rules.proposed (last visited Jan. 18, 2014) (explaining how to submit comments and indicating that there is a limited comment period).

104. *Compare* Proposed New Rule CrR 3.1 Stds – Standards for Indigent Defense, WASH. COURTS, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=261 ("Standard 5.2 . . . : Public defense attorneys shall have an office . . . ."), *with Adoption of New Standards*, *supra* note 32, at Standard 5.2.B. ("Public defense attorneys shall have *access to* an office . . . .") (emphasis added).

105. *Adoption of New Standards*, *supra* note 32.

106. An original version of the rule would have had judges perform this certification. The judicial community quickly expressed its dissatisfaction with the proposal and it was changed to have attorneys personally certify as to their compliance with required standards. *See* Certification of Compliance, *Adoption of New Standards*, *supra* note 32, at 13.

107. Preamble to Standards on Indigent Defense, Order No. 25700-A-1008 (Wash. Sept. 7, 2012) ("[T]he Court recognizes the authority of its Rules is limited to attorneys and the courts.") (hereinafter Preamble).

108. *See The Discipline System*, WASH. STATE BAR ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Discipline (last visited Jan.18, 2014).

109. *See, e.g.*, Admission to Practice Rule 1(a) ("The Supreme Court of Washington has the exclusive responsibility and the inherent power to establish the qualifications for admission to practice law . . . . Any person carrying out the [practice of law] is acting under the authority and at the direction of the Supreme Court.").

Continuing Legal Education (CLE) requirement for practicing attorneys.[110] The Washington State Supreme Court may suspend attorneys who fail to comply with the CLE certification requirement from practicing law.[111]

Because the Standards for Indigent Defense match the WSBA guidelines,[112] attorneys in counties already following the WSBA's recommended indigent defense guidelines will not need to reduce their workload, but simply certify their compliance each quarter.[113] Those whose annual caseloads exceed the maximum provided by the Standards will need to bring their workload into compliance by the time the standards go into effect in 2015.[114]

The Standards make four primary changes that affect attorneys differently, depending on how the attorneys are assigned cases and compensated: (1) caseload limits and weighting;[115] (2) limits on private practice work that may be accepted in addition to an indigent defense caseload; (3) administrative cost provisions; and (4) qualification of attorneys.[116]

1. Caseload Limits and Weighting

Caseload limits are the most hotly debated portion of the Standards.[117] The Court places responsibility on attorneys to accept only workloads that may be managed while providing "quality representation."[118] With the goal of ensuring that the criminal justice system works to protect Washington citizens by creating manageable workloads for attorneys, the Court prescribes limits and calculations for public defenders' annual caseloads.[119]

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110. Admission to Practice Rule 11.2(a) ("Each active member of the Bar Association . . . must complete . . . minimum . . . credit hours of accredited legal education . . . .").

111. Admission to Practice Rule 11.6(c).

112. *See* WASH. REV. CODE § 10.101.030 (2005).

113. *See* Certificate of Compliance, *Adoption of New Standards*, *supra* note 32, at 13.

114. Standard 3.4 pertaining to caseload limits took effect on October 1, 2013. Misdemeanor caseloads must be in compliance in January 2015. *See Indigent Defense Implementation*, *supra* note 38.

115. Meaning, to count a case as more or less than one depending on its complexity.

116. *See Adoption of New Standards*, *supra* note 32.

117. *See infra* Part II.

118. *See* Preamble, *supra* note 107; *Adoption of New Standards*, *supra* note 32, at Standard 3.2 (defining "quality representation" as "the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system").

119. *Adoption of New Standards*, *supra* note 32, at Standards 3.3–3.6.

Standard 3.4 imposes specific numerical maximums for public defenders.[120] For example, a full-time public defender is limited to 150 felonies, 400 misdemeanors, 250 juvenile cases, or 36 appeals per year.[121] There is no indication that the Washington State Supreme Court expects an attorney to limit herself exclusively to one type of caseload (e.g., felonies only).[122] Rather, cases of different magnitudes are to be weighted with these maximums in mind and each attorney is to accept no more than these maximums or a "proportional mix of different types of cases."[123]

Local jurisdictions have the option of assigning weights to various cases, depending on the cases' complexity and the attorney's experience.[124] The local government or entity responsible for contracting indigent defense cases is responsible for case weighting.[125] Case weighting is optional, not mandatory.[126] Case weighting structures are subject to review by the Office of Public Defense and must comply both with the purpose of the Standards (e.g., by not allowing attorneys to spend less time than necessary on their cases) and the Rules of Professional Conduct.[127] Serious criminal charges or complicated investigations may require attorneys to weight a case as more than one when calculating annual caseload.[128] The more likely occurrence is that cases will be weighted downward, as constituting less than a full case.[129] The Court contemplates case weighting downward in such cases as the representation of material witnesses or arraignments.[130] However, the Court advises, "care must be taken because many such representations routinely involve significant work[.]"[131] If cases are weighted, the

120. *Id.* at Standard 3.4.

121. *Id.*

122. *Id.* at Standards 3.4–3.6.

123. Boman, *supra* note 42, at 24 (quoting Certification of Compliance, *Adoption of New Standards*, *supra* note 32, at 13).

124. *See Adoption of New Standards*, *supra* note 32, at Standards 3.4–3.5.

125. *Id.* at Standard 3.5.

126. *Id.*

127. *Id.* at Standard 3.5.B, D. The Office of Public Defense has wide authority to grant funding and support to jurisdictions for public defense purposes—while direct review of case weighting structures may not be explicitly tied to the decision to provide a jurisdiction with funding, it is clearly a component of the OPD's review. *See Indigent Defense Implementation*, *supra* note 38 (case weighting is an area monitored primarily by OPD).

128. *Adoption of New Standards*, *supra* note 32, at Standard 3.6.A.

129. *Id.* at Standard 3.6.B.

130. *Id.*

131. *Id.*

annual misdemeanor limit is 300.[132] A local jurisdiction's case-weighting system is subject to review by the OPD.[133] If local governments fail to adopt case-weighting procedures, attorneys are limited to the 400 misdemeanors per year described in Standard 3.4.[134] The Standards authorize jurisdictions to weight a case as either more or less than one case depending on its complexity.[135]

2. Limitation on Private Practice

Standard 13 imposes new limits on private practice: "Private attorneys who provide public defense representation *shall set limits on the amount of privately retained work* which can be accepted. These limits shall be *based on the percentage of a full-time caseload* which the public defense cases represent."[136] This Standard addresses the common practice of accepting private practice work on top of a public defender caseload.[137] While attorneys are not prohibited from accepting private work under the new Standards, they must calculate the percentage of a full-time workload they accept as public defenders.[138] For example, a defense attorney who represents ninety clients facing felony charges per year is at sixty percent of a full-time defender caseload (which is 150 felony representations). This attorney may work about forty percent of full-time in private practice and remain in compliance with the court rules.

3. Administrative Cost Provisions

The Standards ask that local governments cover certain administrative expenses for public defenders. Rather than asking attorneys to pay overhead costs out of their paycheck, Standard 5.2 asks local government entities to adequately fund such necessities as travel, offices, research, supplies, and training.[139]

This standard may put public defense attorneys in a difficult position because—as the Court acknowledged—the Court's authority is limited

132. *Id.* at Standard 3.4.

133. *Id.* at Standard 3.5.E. *See also* WASH. STATE OFFICE OF PUB. DEF., http://www.opd.wa.gov (last visited Mar. 8, 2014).

134. *Adoption of New Standards*, *supra* note 32, at Standard 3.4.

135. *Id.* at Standard 3.6(A).

136. *Id.* at Standard 13 (emphasis added).

137. Lisa Tabbut is one such attorney. *See supra* notes 25–27 and accompanying text.

138. *Adoption of New Standards*, *supra* note 32, at Standard 13.

139. *Id.* at Standard 5.2(A).

to governing attorneys and courts, not local governments.[140] Although the standard directs local authorities to provide suitable funding,[141] the attorneys are responsible for certifying their compliance with the standard.[142] The attorneys must comply even if the local governments lack adequate funds.[143]

Also, Standard 5.2 requires that attorneys have access to an office.[144] This requirement serves both (1) to facilitate private and accessible attorney-client communication, and (2) to stop defense attorneys from meeting their clients solely in a courthouse.[145] The standards do not require the attorney to maintain an office solely dedicated to their public defender work.[146] Rather, attorneys must simply have access to an office.[147]

4. Attorney Qualification

Finally, the Standards create professional qualifications on top of those demanded by the Rules of Professional Conduct.[148] Attorneys representing criminal defendants must certify that they have adequate experience to handle particular types of criminal cases.[149] The Standards set forth specific qualifications for various charges, including several levels of felonies, dependency cases, civil commitment cases, and appellate work.[150] For example, to serve as lead counsel in a capital case, an attorney must have at least five years of criminal trial experience, served as lead counsel in at least nine jury trials, been lead counsel in at least one aggravated homicide case, and completed a death penalty

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140. Preamble, *supra* note 107 ("[T]he Court recognizes the authority of its Rules is limited to attorneys and the courts.").

141. *Adoption of New Standards*, *supra* note 32, at Standard 5.2.A.

142. *Id.* at 13 (providing a standard certification of compliance).

143. *Id.*

144. *Id.* at Standard 5.2.B.

145. If an attorney only meets her client in a courthouse, it is likely that the meeting is mere moments before a court appearance without time to hear client concerns.

146. *Compare* Proposed New Rule CrR 3.1 Stds – Standards for Indigent Defense, WASH. COURTS, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay Archive&ruleId=261 (last visited March 12, 2014) ("Standard 5.2 . . . : Public defense attorneys shall have an office. . . ."), *with Adoption of New Standards*, *supra* note 32, at Standard 5.2.B. ("Public defense attorneys shall have access to an office . . . .").

147. *Adoption of New Standards*, *supra* note 32, at Standard 5.2.B.

148. *See generally* WASH. RULES OF PROF. CONDUCT tit. I ("Client-Lawyer Relationship").

149. *Adoption of New Standards*, *supra* note 32, at Standard 14.2.

150. *Id.* at Standards 14.2–14.4.

defense seminar.[151] By contrast, to handle a misdemeanor case, an attorney need only meet the basic professional requirements required of all public defenders.[152]

II. PRACTITIONERS' OBJECTIONS PRIOR TO THE ENACTMENT OF THE STANDARDS

The new caseload standards have been met with various criticisms from members of the Washington Bar. Many practitioners used the Court's comment period to articulate concerns.[153] The main critiques can be parsed into two overarching categories: (1) practical concerns with implementation and costs and (2) constitutional concerns regarding the Washington State Supreme Court's exercise of power. The practical concerns focused on the inconvenience of the Standards and the difficulty many jurisdictions would have affording compliance with them.[154] Constitutional concerns focused on funding problems and separation of powers issues.[155] Within all of the criticisms, a divide exists between attorneys working for government and nonprofit offices and those who operate under a contract system, with government attorneys focused on the impact on clients and contract attorneys concerned with practical and fiscal impacts on the practice.[156]

A. Practical Concerns Were Prominent

Numerous comments on the proposed standards raised practical, professional concerns. These comments express three overarching themes: (1) the disparate reactions and language used by defenders in organized offices as compared to those who work under a contract—particularly the fact that the former expressed more concerns for defendants; (2) concerns regarding the cost of compliance, particularly as it will affect how lucrative public defense work will be; and (3)

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151. *Id.* at Standard 14.2(A).

152. *Id.* at Standard 14.2(K) (referencing the basic Standard 14.1).

153. *See generally infra* Part II.A.

154. *See, e.g.*, Letter from Tricia R. Grove, Renton, Wash. attorney, to Wash. State Supreme Court (Oct. 31, 2011) (on file with author).

155. *See* Letter from Hugh D. Spitzer, Foster Pepper PLLC, to Wash. State Supreme Court (Oct. 31, 2011) (on file with author).

156. *Compare* Letter from Ramona Brandes, Northwest Defender Association, to Washington State Supreme Court (Oct. 5, 2011) (on file with author) (discussing "representing clients" and whether "defendants receive representation by qualified attorneys"), *with* Letter from Grove, *supra* note 154 (expressing that "experienced lawyers" can handle a "significantly higher number of *cases*") (emphasis added).

concerns with attorney qualification and office requirements.

1. Salaried Public Defenders Expressed More Concern About Outcomes for Clients

Attorneys working on a contract or appointment basis reacted differently to the Standards than those employed by organized public defender offices. Contract-based attorneys have real concerns regarding how their pay might be affected by the Standards, as well as with the difficulty of locating an office in which to meet clients.[157] In general, there was a lack of concern expressed by contract attorneys—who were previously able to accept more cases at a higher profit—for *defendants'* needs.[158]

Of the comments that expressed specific concerns for defendants,[159] only two came from outside an organized government or nonprofit agency.[160] Two persons writing on behalf of cities expressed concern that the new system may harm those persons who most need legal help.[161] These concerns both derive from the assumption that, faced with a choice to either spend more on public defense or reduce crimes charged, local governments will choose the latter.[162] One commentator believes defendants will be harmed if cited for violations rather than being charged with a crime;[163] another is concerned with the inability to

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157. *See generally* Letter from Heather Straub, Law Offices of Heather R. Straub, PLLC, to Washington State Supreme Court (Sept. 7, 2011) (on file with author); Letter from Christopher Taylor, FT Law, P.S., to Washington State Supreme Court (Sept. 27, 2011) (on file with author); Letter from Suzanne Hayden, Staff Attorney, Juvenile Court, Clallam Pub. Def., to Washington State Supreme Court (Sept. 9, 2011) (on file with author) (all letters from attorneys expressing such logistical and financial concerns).

158. Letter from Grove, *supra* note 154 (expressing that "experienced lawyers" can handle a "significantly higher number of *cases*") (emphasis added).

159. Though several expressed general concern or spoke to the importance of clients.

160. *See, e.g.*, Letter from The Defender Association to Washington State Supreme Court (Oct. 31, 2011) (on file with author); Letter from the University of Washington to Washington State Supreme Court (Oct. 31, 2011) (on file with author); Letter from the Washington Association of Criminal Defense Attorneys to Washington State Supreme Court (Oct. 31, 2011) (on file with author); Letter from the Constitution Project to Washington State Supreme Court (Oct. 31, 2011) (on file with author) (letters coincidentally were all submitted on the final day of the comment period).

161. Letter from Enron Berg, City Supervisor/Attorney, City of Sedro-Woolley to Washington State Supreme Court (Oct. 27, 2011) (on file with author); Letter from Kevin Yamamoto, City Attorney of Puyallup, to Washington State Supreme Court (Oct. 26, 2011) (on file with author).

162. Letter from Berg, *supra* note 161; Letter from Yamamoto, *supra* note 161.

163. Letter from Berg, *supra* note 161 (stating belief that, if law enforcement has to scale back its enforcement of certain crimes due to budget concerns, "we will be writing infractions for crimes and unintentionally denying the very same defendants this rule is intended to help access public

contest traffic infractions if a municipal court closed.[164]

There are two responses to these concerns. First, attorneys who believe local governments incapable of funding public defense at the lighter caseload are mistaken. Grants are available through the OPD, and the implementation of these new standards serves as an opportune time for local authorities to demand more suitable funding from the state as well as from their own taxpayers.[165]

Second, attorneys who expressed concern that a defendant's due process rights will somehow be violated by issuing a traffic citation rather than criminal charge are similarly mistaken. If a jurisdiction approaches these Standards by de-criminalizing certain driving infractions, this is not a disservice to would-be defendants for several reasons. Yes, fewer court services may make it more difficult for recipients of traffic infractions to contest them.[166] However, persons wishing to explain or dispute traffic citations may do so via letter if a more local municipal court were to close.[167] And, most importantly, the notion that replacing a criminal charge with an infraction would have negative implications for those accused is shortsighted.[168] A person who is cited—rather than charged—with small infractions such as Driving While License Suspended (DWLS) does not face the collateral consequences of conviction.[169] A citation would likely be a much smaller inconvenience than the numerous court appearances required in defending against a criminal charge. To assume that de-criminalizing petty crimes is a disservice to accused persons is a creative—though inaccurate—way of critiquing the Standards.[170]

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defenders").

164. Letter from Yamamoto, *supra* note 161 ("In some situations, local governments may be forced to end localized prosecution and close municipal courts . . . . And, there will be collateral effects to recipients of traffic infractions who choose to contest their citations.").

165. *See generally* WASH. STATE OFFICE OF PUB. DEF., ANNUAL REPORT: FISCAL YEAR 2011 (2011) (detailing grant funding disbursement and use over the year).

166. *See* Letter from Yamamoto, *supra* note 161.

167. *See, e.g.*, *Mitigation Hearing Form*, CITY OF RENTON, *available at* http://rentonwa.gov/uploadedFiles/Living/AJLS/MITIGATION%20BY%20MAIL%20RMC081.pdf (last visited Oct. 17, 2013).

168. *See* Letter from Berg, *supra* note 161.

169. Collateral consequences include possible immigration consequences, a conviction of record interfering with public housing and employment applications, and/or the subsequent sentencing implications of having a prior criminal record.

170. *See, e.g.*, Letter from Yamamoto, *supra* note 161.

2. Increased Costs Will Cause Negative Consequences and Lower Attorney Compensation

Many commentators were concerned with the cost of complying with the rule.[171] Once public defense attorneys are limited in the cases they can handle, local governments may have to hire additional attorneys. These increased costs will be difficult to recover during a time of constrained local budgets.[172]

Some people believed that jurisdictions would no longer be able to pay talented and experienced public defenders enough.[173] Regarding attorney compensation, those who had previously relied on handling a high number of cases in order to reach a certain annual income face the most change under the new rule.[174] Annual limits on cases will reduce the capacity of attorneys to accept more cases—or a higher proportion of a jurisdiction's cases—in order to earn a higher income. Public defense contractors may no longer maintain a private practice to make ends meet. The greatest resistance to caseload limits comes from attorneys who may no longer be able to enjoy the same level of compensation for public defense work.[175]

On the other hand, attorneys employed by an organized public defense office generally do not face the same dramatic shift that those appointed counsel under a contract would face.[176] Most public defender

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171. *See, e.g.*, Letter from John Marchione, Mayor of Redmond, to Wash. State Supreme Court (Oct. 24, 2011) (on file with author) (stating concern with the "unintended consequence" of hiring the cheapest public defenders possible); Letter from Yamamoto, *supra* note 161 (stating that experienced and effective defense attorneys can no longer afford to retain their positions).

172. *See, e.g.*, Brian Rosenthal, *How Budget Constraints Narrowed Olympia's DUI Crackdown*, SEATTLE TIMES (June 26, 2013), http://seattletimes.com/html/localnews/2021277204_duibillxml.html; *How Budget Cuts Could Affect Washington State*, SEATTLE TIMES (Feb. 24, 2013), http://seattletimes.com/html/localnews/2020428109_apwabudgetbattlewashglance2ndldwritethru.html (demonstrating Washington's budget constraints).

173. *See, e.g.*, Letter from Marchione, *supra* note 155; Letter from Yamamoto, *supra* note 161.

174. The general understanding is that attorneys overburden their caseload with misdemeanor representation; 150 felony cases per year is not a limit that is generally being pushed. *See* E-mail from Clarke Tibbits, Director of Kitsap County Office of Public Defense, to Author (Apr. 10, 2013, 9:45 PST) (on file with author) (Kitsap County has limited defenders to 150 felonies per year; no one would be assigned more); Telephone Interview with Michael Kawamura, Director of Pierce County Office of Public Defense (Apr. 11, 2013) (notes on file with author) (caseload limits for felonies already practiced); E-mail from Ann Christian, Clark County Indigent Defense Coordinator, to Author (Apr. 1, 2013, 4:01 PST) (on file with author) [hereinafter the author collectively refers to these three sources as "Correspondence with Defense Coordinators"].

175. Though concerned attorneys could demand better-paying contracts. *See* Jeff Barge, *Defenders Seek Parity in Pay, Caseloads*, 80 A.B.A. J. 24 (1994) (New York City defense attorneys went on strike for this reason).

176. *Adoption of New Standards*, *supra* note 32, at Standard 13 (Though beyond the scope of this

offices already limit attorneys to a certain annual caseload, and attorney compensation tends to be on salary rather than contingent upon a certain number of cases taken.[177]

a. Attorneys Who Previously Could Turn a Higher Profit Will Be Limited

Caseload limits and the limits on private practice are the changes most likely to impact attorney compensation. An attorney paid per case or per a percentage of cases may be incentivized to disobey the limits or weight cases strategically. Additionally, attorneys who supplemented their public defense income with private practice work will now be limited to one full-time job where they were formerly able to work more than a full-time caseload.[178] These problems seem most likely to occur where an attorney contracts with the local court, as compared to a position in a public defender's or not-for-profit office.[179]

3. Office and Qualification Requirements Are Unnecessary to Provide a Quality Defense

Practitioners took issue with both the additional professional qualifications and the requirement to have access to an office in the Standards.[180] Some felt that the culture of public defense work was being disrupted by the addition of these Standards. One attorney wrote, "[t]hese cases often do not pay well, and are not necessarily 'regular

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Comment, a recent lawsuit caused the four nonprofit public defense agencies in King County to restructure. King County defenders face similar stress and uncertainty, though primarily due to the lawsuit and not the implementation of these Standards. *See Council on Public Defense Meeting Minutes*, WASH. STATE BAR ASS'N (Feb. 1, 2013); Dolan v. King Cnty., 172 Wash. 2d 299, 258 P.3d 20 (2011).

177. *See, e.g.*, *2003 Snohomish County List of Employees, Job Title and Salary*, http://lbloom.net/xsnoh03.html (last visited Oct. 17, 2013); *2012 Attorney Pay Plan*, YAKIMA COUNTY HUMAN RES., http://www.yakimacounty.us/pers2/Pay%20Plans/2012%20Attorney%20Pay%20Plan.pdf (last visited Oct. 17, 2013); *see also Spokane County Public Defender*, *supra* note 49 (organized offices that pay defense attorneys a salary, Spokane County lists guidelines that predate the mandated standards).

178. *See Adoption of New Standards*, *supra* note 32. Standard 13 allows this "full-time job" to be comprised of both private and public defense work, but attorneys may only accept private practice work to the extent that they are not handling a full-time public defense caseload.

179. This assertion is based on the assumption that attorneys who receive a stable salary would not need to supplement their income with additional cases. *See, e.g.*, *Human Resources: Job Classifications and Pay*, SPOKANE CNTY., http://www.spokanecounty.org/hr/jobclassifications.aspx#P (last visited Oct. 18, 2013) (indicating the salary of Spokane County public defenders).

180. *See, e.g.*, Letter from Straub, *supra* note 157.

employment,' which makes them attractive cases for newer attorneys to gain experience and attorneys who are slowing down their practice," a very practitioner-focused concern.[181] Others disfavored the requirement of an office, which has since been changed.[182]

B. Concerns That the Washington State Supreme Court Exceeded Its Constitutional Authority Are Moot or Unlikely to Be Litigated

The Association of Washington Cities expressed doubts as to the constitutionality of the Standards in an effort to halt their passage.[183] The cities raised two complaints with the rule creating the Standards: (1) as a Court rule that compels funding, it is an illegitimate exercise of the judicial power; and (2) it fails to comply with the basic requirements of a Court rule.[184] However, these concerns are either moot or unlikely to be litigated.

1. The Rule Compels Funding and Is Thus Invalid

The cities asserted: "[A]dequate funding for indigent defense services is, fundamentally, the responsibility of elected lawmakers."[185] The cities suggested that the rule unconstitutionally requires local authorities to expend funds.[186] The cities pointed out that the standards "effectively order the expenditure by cities of substantial sums—and would do so *not* through the legislative process."[187]

This argument is based on the Washington State Constitution, which forbids the expenditure of state funds "except in pursuance of an appropriation by law."[188] However, in *In re Juvenile Director*,[189] the Washington State Supreme Court held that the judiciary holds an inherent power to "compel funding of its own functions."[190] This power is limited to circumstances in which the Court demonstrates through

181. *Id.*

182. Now attorneys simply need "access to an office." *Adoption of New Standards*, *supra* note 32, at Standard 5.

183. Letter from Spitzer, *supra* note 155.

184. *Id.* (citing State v. Templeton, 148 Wash. 2d 193, 59 P.3d 632 (2002)).

185. *Id.* at 1.

186. The Standards do not mention funds, but if jurisdictions need to hire more public defenders, they arguably mandate funding indirectly.

187. Letter from Spitzer, *supra* note 155 (emphasis added).

188. *See* WASH. CONST. art. VIII, § 4.

189. 87 Wash. 2d 232, 552 P.2d 163 (1976).

190. *Id.* at 249, 552 P.2d at 171.

"clear, cogent, and convincing proof of a reasonable need for additional funds," and in which those funds are "reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties."[191]

The cities assert that the Court may only compel funding "in the context of a case in controversy."[192] This premise is based on basic separation of powers principles.[193] The cities argue that, because the Standards are created without a case or controversy, they are an invalid exercise of the Court's power.[194]

2. The Rulemaking Approach Is Inappropriate

The cities also argue that the Standards are an invalid exercise of rulemaking authority.[195] The letter identifies such legitimate court rules as (1) the Electronic Filing Technical Standards for the Washington State Courts; (2) Courthouse Safety Standards; and (3) Washington State Child Support Schedule Definitions and Standards.[196] These are distinguished from the Standards for Indigent Defense as they deal solely with internal workings of the court system—the appropriate scope of a court rule.[197] The Standards, argue the cities, exceed this power by quasi-legislating, demanding that local governments expend funds in the form of public defender contracts and salaries.[198]

3. Inability/Unlikelihood of a Constitutional Challenge

Despite these legitimate concerns, commenters indicate that the Standards are unlikely to face a constitutional challenge.[199] This is due to (1) difficulties in determining standing, (2) a general resistance to confronting the Court, and (3) the fact that a constitutional challenge

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191. *Id.* at 250–51, 552 P.2d at 173–74.

192. Letter from Spitzer, *supra* note 155.

193. *See, e.g.*, WASH. CONST. art. IV, § 4 (power is limited to "actions and proceedings"); State v. Superior Court for King Cnty., 148 Wash. 1, 267 P. 770 (1928).

194. It may have been possible for the Court to take an ineffective assistance of counsel case and require annual caseload limits as part of its holding—a more explicit version of the discussion in *A.N.J.*—though this would be incredibly difficult.

195. Letter from Spitzer, *supra* note 155.

196. *Id.*

197. *See generally* Hugh Spitzer, *Court Rulemaking in Washington*, 6 U. PUGET SOUND L. REV. 31 (1982).

198. Letter from Spitzer, *supra* note 155.

199. *See* Interview with Hugh Spitzer, Visiting Professor of Law, University of Washington School of Law, in Seattle, Wash. (Apr. 8, 2013).

would have to be raised in the Washington State Supreme Court.[200] First, local jurisdictions frustrated by the Standards will likely not have standing[201] because they are not directly regulated by the rule.[202] Second, attorneys who object to the new Standards are unlikely to personally confront the Court on this matter, in the interest of maintaining a good working relationship.[203] Last, the only forum for a challenge to the constitutionality of the Standards would be a state court.[204] Eventually, in order to get the Standards overturned, the Court would have to deem unconstitutional the very order that it issued. While it may be possible for the Court to overturn its own court rule,[205] such an outcome is highly unlikely.[206]

III. LIFE AFTER THE STANDARDS: THE SKY HAS NOT FALLEN

Over the above-mentioned protests, the Standards were enacted and became effective on September 1, 2012, save for Standard 3.4, the implementation of which is awaiting a time study by the OPD.[207] In the short period of time since the Standards' enactment, public defenders have been adapting to these changes. Thus far, none of the drastic outcomes anticipated by critics has been realized.

A. Certification Has Gone Forward

The first round of individual attorney certifications took place on October 1, 2012.[208] Though this required administrative time in courts

200. *Id.*

201. *See* City of Seattle v. State, 103 Wash. 2d 663, 668, 694 P.2d 641, 645 (1985) ("The basic test for standing is 'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'") (citing Seattle Sch. Dist. No. 1 of King Cnty. v. State, 90 Wash. 2d 476, 493, 585 P.2d 71, 82 (1978)).

202. *See Adoption of New Standards*, *supra* note 32.

203. In order to challenge the Standards, attorneys would have to directly challenge the only governing body that has the power to discipline and disbar them. *See* WASH. STATE BAR ASS'N, *supra* note 108.

204. There would not be federal subject matter jurisdiction in a case challenging the Standards.

205. Court rules may be examined and interpreted in the same manner as statutes. State v. McIntyre, 92 Wash. 2d 620, 622, 600 P.2d 1009, 1009–10 (1979).

206. Even CrR 3.3, which applies a different standard than the constitutional right to a speedy trial, was not overturned by the Court, even given this difference. State v. Terranova, 105 Wash. 2d 632, 651, 716 P.2d 295, 305 (1986); *see generally* Interview with Spitzer, *supra* note 199.

207. With Standard 3.4 pertaining to caseload standards becoming effective January 2015.

208. *See* WASH. STATE OFFICE OF PUB. DEF., REPORT TO THE WASH. SUPREME COURT ON THE

across Washington, by all accounts it was an otherwise normal day, save for a few attorneys submitting late certifications.[209] In a survey of court personnel, 88% experienced no problems during certification.[210] Of the problems identified by the other 12%, most were minor difficulties with late forms, the higher workload for court personnel on that day, and a few "concerns about ambiguity of the Standards."[211] Discussions with public defense providers confirm this perception; certification requires administrative and staff time, but is manageable.[212] Only one attorney refused to certify according to the new court rule.[213] A follow-up survey performed by the OPD in March of 2013 indicates that certification continues to go smoothly, save for a handful of attorneys who fail to submit their certifications on time.[214]

B. Some Attorneys Left the Practice

It would be inaccurate, however, to claim that public defense practice has changed only in regards to additional paperwork. Three Benton County public defenders—Scott Johnson, Dan Arnold, and Kevin Holt—engaged in a two-month contract dispute in light of the new caseload limits.[215] The dispute's resolution cost the county nearly $48,000 to pay the remainder of the attorneys' contracts and fees.[216] The attorneys felt that they were already "grossly underpaid" for their work, and that caseload limits would reduce even that compensation.[217] Three other attorneys resigned from Benton County around the same time.[218] While Benton County already limited its public defense attorneys to 150

IMPLEMENTATION OF STANDARDS FOR INDIGENT DEFENSE: PURSUANT TO WASHINGTON SUPREME COURT ORDER NUMBER 25700-A-1013, at 2 (2013) [hereinafter OPD, REPORT TO WASH. SUPREME COURT].

209. *See* E-mail from Ann Christian, Clark County Indigent Defense Coordinator, to Author (Apr. 1, 2013, 4:01 PST) (on file with author).

210. *See* OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 3.

211. *Id.*

212. *See* Correspondence with Defense Coordinators, *supra* note 174.

213. *Id.*

214. *See* OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208.

215. Paula Horton, *Benton County to Pay Off 3 Public Defenders*, TRI-CITY HERALD (Nov. 10, 2012), http://www.tri-cityherald.com/2012/11/10/2165631_benton-county-to-pay-off-3-public.html.

216. *Id.* One of the attorneys said, "Kevin and I were happy, given the circumstances, to take three extra months of pay without any additional work." *Id.*

217. *Id.* Though the county Indigent Defense Coordinator indicated that attorney compensation should actually *increase* when the caseload standards take effect.

218. Paula Horton, *6 Benton County Public Defenders Resign*, TRI-CITY HERALD (Sept. 8, 2012), http://www.tri-cityherald.com/2012/09/08/2091539/6-benton-county-public-defenders.html.

felony cases per year, the limitations on private practice appeared to be the cause of the attorneys' dissatisfaction.[219] At one point, only four attorneys remained on the defense panel to represent indigent clients in Benton-Franklin Counties, though positions were quickly filled.[220]

C. Criminal Caseloads Are Already Decreasing

Many pre-enactment concerns with the Standards revolved around budgetary impossibilities and the inevitable demand for increased funding.[221] Yet the state has experienced savings in its criminal justice system from a variety of sources that have coincided with the enactment of the Standards as outlined below. Between 2008 and 2012, criminal case filings have decreased, with approximately 50,000 fewer misdemeanors filed and 5000 fewer criminal cases filed in superior court.[222]

First, crime rates have steadily decreased since 1994, lessening the demand for defense attorneys.[223] Second, some non-violent misdemeanors have been reclassified as civil infractions, which similarly reduces defense costs.[224] Pierce County has decriminalized driving while license suspended in the third degree (DWLS-3), certain fishing violations, and failure to transfer title into civil penalties.[225] Several city ordinances have been changed from misdemeanors to civil infractions.[226] And a recent piece of statewide legislation effective as of June 2013 eliminates criminal charges for DWLS-3 for moving traffic violations.[227] The OPD believes this will reduce criminal charges in courts of limited

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219. *The Herald* reports, "A large percentage of the contract attorneys do private work on the side, and some also own law firms." *Id.*

220. The newly hired attorneys included Gary Metro, one of the attorneys who had previously resigned. He subsequently re-interviewed for his position and joined the defense panel. Paula Horton, *Benton County OKs Defense Attorney Contracts*, TRI-CITY HERALD (Dec. 23, 2012), http://www.tri-cityherald.com/2012/12/23/2215154/benton-county-oks-defense-attorney.html. The most prominent example of these reactions appears to be in the Benton-Franklin Counties' shared offices, though it is feasible that other contract-based attorneys would leave the practice for more lucrative outlets.

221. *See, e.g.*, Letter from Spitzer, *supra* note 155; Letter from Straub, *supra* note 157.

222. *See* OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 5.

223. *See id.*

224. *See id.*

225. *Id.* at 5–6.

226. *See* SUNNYSIDE, WASH. MUN. CODE tit. 5, ch. 5.02, § 020 (2013) (residential rental housing); SUNNYSIDE MUN. CODE tit. 5, ch. 42 (fireworks); SUNNYSIDE MUN. CODE tit. 9, ch. 34 (nuisances); CHEHALIS, WASH. MUN. CODE tit. 6, ch. 4 (2013) (animal control); SEQUIM, WASH. MUN. CODE tit. 18, ch. 58 (2013) (sign code).

227. *See* WASH. REV. CODE § 46.20.289 (2013); ESSB 6284 62d Leg., Reg. Sess. (Wash. 2012).

jurisdiction by six percent.[228]

Second, Washington state voters legalized marijuana when they passed Initiative 502.[229] Historically, about 4.1 percent of the criminal filings in courts of limited jurisdiction have been adults in possession of small amounts of marijuana.[230] A significant reduction in criminal caseload is possible in light of this legalization.[231]

Third, diversion programs for defendants charged with non-violent offenses and with little or no criminal history continue to drive down criminal filings.[232] Between 2009 and 2012, almost twice as many cases—from 5.3% in 2009 to 9.7% in 2012—filed in courts of limited jurisdiction end in either a formal or informal diversion.[233] Successful diversion programs have been offered in King, Snohomish, and Whitman Counties,[234] as well as in Bellevue[235] and Anacortes.[236]

D. Wilbur v. City of Mount Vernon

On December 4, 2013, Judge Robert Lasnik issued a decision in the case of *Wilbur v. City of Mount Vernon*[237] in which Joseph Jerome Wilbur sued on behalf of himself and others similarly situated for a violation of his Sixth Amendment rights.[238] The suit was brought by the American Civil Liberties Union and before the decision was rendered, the United States Department of Justice (DOJ) expressed interest in the

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228. *See* OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 6.

229. *See, e.g.*, Jonathan Martin, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Nov. 6, 2012), http://seattletimes.com/html/localnews/2019621894_elexmarijuana07m.html.

230. OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 7–8.

231. Particularly after the U.S. Department of Justice's recent announcement that it will not resist the Washington law. *See* Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Aug. 29, 2013), http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html.

232. OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 10.

233. *Id.* at 17. *See also* Spurgeon Kennedy et al., National Association of Pretrial Services Agencies, *Promising Practices in Pretrial Diversion*, 16 (2006) (noting that not only do diversion programs reduce the impact of criminal cases on the criminal justice system, but also benefit the accused; the recidivism rate for successful felony diversion program participants is five percent).

234. OPD, REPORT TO WASH. SUPREME COURT, *supra* note 208, at 19.

235. *Id.*

236. *See Council on Public Defense Meeting Minutes*, WASH. STATE BAR. ASS'N (Nov. 16, 2012).

237. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319 (W.D. Wash. Dec. 4, 2013).

238. *See supra* Introduction (discussion of Mr. Wilbur's case and his over-worked public defender).

outcome of the suit.[239] The DOJ urged the Western District of Washington to consider an unprecedented remedial measure in a right to counsel case—the DOJ encouraged the court to authorize a federal watchdog to ensure defendants' right to counsel would be honored.[240] Ultimately, Judge Lasnik determined that the caseloads being managed by Mount Vernon and Burlington's public defenders were so large as to deprive criminal defendants of their Sixth Amendment right to counsel:

> [The] attorney represents the client in name only in these circumstances, having no idea what the client's goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist. Such perfunctory "representation" does not satisfy the Sixth Amendment.[241]

The *Wilbur* decision requires the cities of Mount Vernon and Burlington, which have relied on public defense attorneys taking as many as 1200 cases per attorney per year, to hire a part-time public defense supervisor.[242] The public defense supervisor will monitor the work of public defenders, including the quality of their client contact, the use of investigators, the use of interpreters when needed, and communication of options to their clients.[243] The decision marks a significant victory for those concerned with the quality of public defense and specifically discussed the impact of attorney caseload on this fundamental constitutional right.[244] Unfortunately, Judge Lasnik's decision refers to the Standards as "best practices to which the Cities aspire," which glosses over their mandatory nature—and emphasizes the need for a meaningful enforcement mechanism so the Standards are not

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239. *Wilbur*, 2013 WL 6275319, at *1; *see also* Statement of Interest for the United States, *Wilbur*, 2013 WL 6275319.

240. *See* Statement of Interest for the United States, *Wilbur*, 2013 WL 6275319; Mike Carter, *Indigent-Defense Case Could Result in Federal Oversight of a Public-Defender Agency*, SEATTLE TIMES (Sept. 7, 2013), http://seattletimes.com/html/localnews/2021778422_dojindigentdefense1xml.html.

241. *Wilbur*, 2013 WL 6275319, at *7 (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)).

242. *Id.* at *10.

243. *Id.* at *10–12.

244. The decision commends the Washington State Supreme Court's decision to impose hard caseload limits ("[T]he Washington Supreme Court's efforts in this area are laudable . . . ."), but rather than adopting the Standards as a Sixth Amendment requirement, determines that the workload undertaken by Mount Vernon and Burlington public defenders failed to provide the "time and effort necessary to ensure constitutionally adequate representation for the client," largely due to the time constraints such a severe caseload would impose. *Id.* at *6.

treated simply as "best practices" or guidelines as previous efforts.[245]

IV. POTENTIAL PROBLEMS: THE STANDARDS ARE FAR FROM PERFECT

Even as the Standards are timidly adopted, potential problems with their implementation and success may be identified based on what is already known about the Standards and as reflected by the concerns of experienced practitioners. Most prominent among these potential problems are (1) the lack of enforcement mechanisms in the Standards, (2) concerns with funding and attorney compensation, and (3) the potential for weighting cases in a strategic way so as to circumvent the purpose of the Standards.

A. The Standards Lack a Meaningful Enforcement Mechanism

The key piece missing from the Standards is a vehicle for enforcement.[246] Attorneys are essentially on the honor system to certify that they comply with the standards; not even a penalty of perjury is indicated on the certification form.[247] Due to the fragmented way that Washington regulates its public defense system,[248] there is no central oversight; and the Washington State Supreme Court cannot discipline attorneys who fail to follow the Standards unless it is made aware of an issue. Unless a good reason exists to inquire into the authenticity of an attorney's certification, the process could be easily manipulated—which could be reminiscent of the difficulties encountered before the Standards.

The Washington State Supreme Court has the power to regulate attorneys.[249] As demonstrated by the Continuing Legal Education (CLE) requirement, the Court may require attorneys to keep up with specific compliance requirements—and even risk losing their bar licenses for failure to do so.[250] Washington attorneys must complete CLE hours and certify their compliance regularly to the court; falling behind either on the credit hours or the certification may result in suspension of their

245. *Id.* at *2 n.4.

246. The reader will remember that this same problem contributed to a lack of compliance with RCW section 10.101.030.

247. *See, e.g.*, *Adoption of New Standards*, *supra* note 32, at Certification of Compliance.

248. By county and municipality rather than a statewide agency.

249. *See supra* Part I.D.

250. *See* APR 11.6(c).

license.[251] The Standards contain no such language authorizing the Court to suspend attorney licenses for failure to comply.[252]

There are four possible solutions to this problem: (1) implementing the standards into bar discipline measures; (2) granting punitive authority to the OPD to sanction uncooperative jurisdictions; (3) the federal government could step in as an independent monitor; or (4) compliance with the standards could become a consideration when courts consider ineffective assistance of counsel claims.

First, the WSBA may include failure to comply or falsely certifying to compliance as appropriate grounds for bar sanctions.[253] This was contemplated during the formation of the Standards and may still occur as implementation moves forward.[254] Though the possibility of discipline may increase attorney accountability, the rarity of bar sanctions[255] makes this mechanism better suited for extreme cases rather than as the primary method of enforcement.

Second, the OPD could be given more authority to penalize local jurisdictions and individual attorneys who fail to comply with the Standards. The OPD already issues grants to local jurisdictions—but only those who demonstrate compliance with the Standards.[256] To the extent that this is not already an incentive for jurisdictions to limit the amount of work their public defense attorneys may perform, OPD could be endowed with additional power to sanction non-compliant jurisdictions and lawyers.[257]

Third, the federal government could be authorized to step in as an independent monitor. This was done for a six-year period in Grant

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251. *Id.* ("Any lawyer . . . who has not complied by the certification deadline . . . may be ordered suspended from the practice of law by the Supreme Court.").

252. *See generally Adoption of New Standards*, *supra* note 32.

253. *See* Letter from Doug Ende, WSBA Disciplinary Counsel, to Chief Justice Madsen (Sept. 7, 2012) (on file with author).

254. *See Council on Public Defense Meeting Minutes*, WASH. STATE BAR ASS'N (Oct. 26, 2012). However, bar sanctions are rare and would require another body to report an incompliant attorney.

255. *See In re* Disciplinary Proceeding Against Romero, 152 Wash. 2d 124, 94 P.3d 939 (2004).

256. *See* WASH. STATE OFFICE OF PUB. DEF., *supra* note 165.

257. A possibility that already exists in civil suits for damages. *See* Bill Morlin, *$3 M Jury Award Shines Light on Public Defender Contracts*, TRI-CITY HERALD (Feb. 1, 2009), http://www.tri-cityherald.com/2009/02/01/465803/3m-jury-award-shines-light-on.html; Wilbur v. Mount Vernon, No. C11-1100RSL, 2012 WL 600727 (W.D. Wash. Feb. 23, 2012). The State may also look to agencies with more robust sanctioning powers such as the Office of Financial Management (OFM), or growth hearing boards which may deny incompliant plans outright both by denying funding and by appropriate sanctions. *See Growth Management Hearings Boards*, WASH. STATE, http://www.gmhb.wa.gov (last visited Sept. 14, 2013).

County through partnership with the DOJ.[258] Federal monitoring would have to balance federalism concerns of state control,[259] but would provide the benefit of independent expertise and save state court time and money.[260]

Finally, if compliance directly affected the determination of effective assistance of counsel on appeal, both defenders and prosecutors would take notice. While defense attorneys were previously entitled to a presumption of effectiveness,[261] the tide appears to be shifting for attorneys who take too many cases per year.[262] One way to bolster the efficacy of the Standards would be for courts not to presume effectiveness when it can be established that an attorney did not comply with the Standards set forth by the state Supreme Court.[263] Prosecuting attorneys would take care that their colleagues in the defense community were truly complying with the caseload limits, because a determination of ineffectiveness would undermine the soundness of criminal convictions.

1. Entire Jurisdictions Could Weight Cases Too Lightly and Circumvent the Standards

In addition to concerns about individual attorney enforcement, it may be possible for entire jurisdictions to work around the caseload limits by weighting regular cases as constituting less than one full case.[264] Those working for-profit may have the incentive to weight cases as less than one in order to comply with the annual limits in the Standards. For example, attorneys paid by percentage of cases taken may be incentivized to weight cases as less than one in order to actually represent more clients and make more money. Similarly, municipalities that profit off of their municipal courts will be incentivized to give

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258. *See* Statement of Interest for the United States at 7, Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319 (W.D. Wash. Dec. 4, 2013).

259. *Id.* at 6.

260. *Id.* at 5–6.

261. *See generally* Strickland v. Washington, 466 U.S. 668, 689 (1984).

262. *See* State v. A.N.J., 168 Wash. 2d 91, 112, 225 P.3d 956, 967 (2010) (setting forth factors for the court to consider in making a determination of ineffectiveness, including a discussion of indigent defense standards put forth by the WSBA).

263. *See* Brief for The Defender Initiative and the Washington Association of Criminal Defense Lawyers as Amici Curiae for Defendant Maribel Gomez, In the Personal Restraint Petition of Maribel Gomez, No. 86711-9, 2013 WL 556306, at *1–2 (Wash. petition for review granted Sept. 6, 2012) (this does not go so far as to suggest an excessive caseload creates a presumption of ineffectiveness).

264. *See supra* Part I.D.1.

public defenders as many cases as possible by weighting cases downward.[265] However, to utilize case weighting unilaterally would defeat the twin purposes of the caseload limits: to (1) improve the quality of defense provided to indigent clients and (2) make more reasonable the workload of public defense attorneys.[266]

By November 2012, the OPD had received six proposed case weighting systems, none of which complied with the court's Standards.[267] Federal Way has since adopted a creative method by which to comply with the new Standards but also to maintain appointed defenders' relatively large caseloads.[268] In Federal Way's proposed system, many misdemeanors are counted as only one-half or one-third of a case.[269] The Washington State Supreme Court has since tasked the OPD to conduct a time study to determine appropriate case-weighting structures.[270] Anacortes represents a jurisdiction that has adopted a "wait and see" approach to weighting cases until the Court renders a decision in light of this time study—despite concerns stemming from the successful lawsuit against Mount Vernon and Burlington.[271]

B. Funding Must Be Adequate for This Constitutional Right

Even if the implementation of the Standards results in additional expenditures, such funding is necessary. All indigent clients to receive representation from a public defender in compliance with caseload limits

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265. Municipal Courts generate revenue for several cities. *See* CITY OF BURLINGTON, 2012 BUDGET 19–21 (the Municipal Court annually generates about $20,000 in revenue, $24,500 in criminal conviction fees, and over $70,000 in criminal misdemeanor penalties); CITY OF SEDRO-WOOLEY, 2012 BUDGET 19, *available at* http://www.ci.sedro-woolley.wa.us/Finance/documents/Budget/2012_Final_Budget.pdf (last visited Feb. 11, 2014) (the municipal court profits are split between the city and State, which receives 35%); CITY OF FEDERAL WAY, 2011/2012 ADOPTED BUDGET 215, *available at* http://www.cityoffederalway.com/DocumentCenter/Home/View/1487 (last visited Feb. 11, 2014) (the municipal court generates $1.5 million in fines/forfeitures, allowing this budget item to break even).

266. *See Adoption of New Standards*, *supra* note 32, at Standard 3.2 ("The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation.").

267. *See Council on Public Defense Meeting Minutes*, *supra* note 236, at 3.

268. *See* Federal Way City Council Resolution 12-624 (2012).

269. For example, Carrying or Display of Weapons is counted as one-third, Disorderly Conduct is one-third, and certain forms of Fraud are counted as one-third or one-half of a case. *Id.*

270. *See Indigent Defense Implementation*, *supra* note 38.

271. Kimberly Jacobson, *Increases for City Prosecutor, Public Defender*, GOANACORTES.COM (Oct. 30, 2013), *available at* http://www.goanacortes.com/news/entry/increases_for_city_prosecutor_public_defender (last visited Dec. 22, 2013); *see also* Wilbur v. Mount Vernon, No. C11-1100RSL, 2013 WL 6275319 (W.D. Wash. Dec. 4, 2013).

will likely require hiring more defenders. To be sure, there is a limit to the amount of funding a local government—even assisted by the state—will be able to provide. The progression shown in Mount Vernon and Burlington, discussed in the *Wilbur v. Mount Vernon* case, shows the additional costs of hiring more and more attorneys to handle the public defense caseload.[272] In the years following Sybrandy and Witt's excessive caseload, the cities implicated in the *Wilbur* lawsuit hired a law firm—with more than two attorneys—to handle its public defense caseload.[273] As the lawsuit advanced, and after the Standards were enacted, the law firm hired additional attorneys to make progress towards compliance with the standards.[274]

This scenario, however, is only made manifest if a jurisdiction continues to charge crimes at the same rate as before the Standards were implemented. A combination of reduced criminal charges, particularly for smaller non-violent offenses, with increased funding by the state and local authorities, would easily curb a budget crisis. Local jurisdictions retain total control over the entire criminal caseload—and thus, its associated costs—through the power of its law enforcement and prosecuting attorneys' offices.[275]

In the alternative, recognizing the importance of charging persons with crimes that endanger local communities, local jurisdictions may consider alternatives to incarceration that may result in savings such as drug treatment programs, mental health wellness courts, and/or restorative justice models.[276] When faced with limited resources, communities may be enabled to consider more rehabilitative options for young and new offenders that serve not only to better address the cause of the criminal activity, but to reserve social resources for incapacitating and prosecuting those who present graver danger to their communities.

There are also savings to be found elsewhere in the criminal justice

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272. *Wilbur*, 2013 WL 6275319, at *2–3 (demonstrating the progression from Sybrandy and Witt to hiring a firm named Mountain Law, which subsequently had to keep hiring additional attorneys).

273. *Id.*

274. *Id.*

275. Based on the power of local District Attorneys' offices to pursue or dismiss criminal charges.

276. *See, e.g.*, *Adult Drug Courts*, WASH. COURTS, http://www.courts.wa.gov/court_dir/?fa=court_dir.psc&tab=2 (last visited Sept. 21, 2013); *Mental Health Courts*, WASH. COURTS, http://www.courts.wa.gov/court_dir/?fa=court_dir.psc&tab=5 (last visited Sept. 21, 2013); *LEAD: Law Enforcement Assisted Diversion*, LEAD KING COUNTY, http://leadkingcounty.org (last visited Sept. 21, 2013) (pre-booking diversion for low-level drug and prostitution crimes rather than traditional prosecution).

system. Efforts to decriminalize or divert charges have led to savings.[277] This movement will continue to reduce collateral consequences to the accused, limit the burden on public defenders, and provide savings to the court system. The decriminalization of certain marijuana possession charges[278] is especially likely to generate savings. Between misdemeanor diversion programs and the legalization of marijuana, a significant reduction in Washington's criminal caseload may already be anticipated.[279]

Of paramount importance is the simple fact that this is not a request for taxpayer funds for a novel piece of programming. Rather, this is funding necessary to defend a fundamental constitutional right, which has not been adequately protected in its fifty years of existence.[280]

V. RECOMMENDATIONS

For the new Standards to be successful, (1) a meaningful enforcement mechanism should be implemented, (2) funding solutions can be assisted by jurisdictions continuing their efforts to decriminalize non-violent misdemeanors and utilize diversion programs, and (3) counties should more meaningfully assess how various cases are weighted using the OPD time study.

A. Individual Enforcement Mechanism

The Washington State Supreme Court should seriously consider bolstering the enforceability of the Standards in two ways: (1) first, by including language in the Standards that indicate their mandatory nature, and (2) by empowering the OPD to serve additionally as public defense supervisors, borrowing from Judge Lasnik's decision in *Wilbur*.[281]

First, the Standards should contain language emphasizing that they are requirements, so as to avoid the perception that they represent merely

277. *See supra* Part III.C.

278. *See* WASH. STATE OFFICE OF FIN. MGMT, FISCAL IMPACT STATEMENT (1–502) (2012).

279. *See supra* Part III.C.

280. Washington has recently been reminded of its duty to adequately fund public education in *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227 (2012). Political reactions, however, seem to embrace the education requirement while ignoring the State's duty to fund defense for its indigent defendants. Meanwhile, a right identified by the Supreme Court in *Gideon v. Wainwright* and revisited in the years since remains a difficult one to sell and defend politically. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Lafler v. Cooper, __U.S.__, 132 S. Ct. 1376 (2012), Missouri v. Frye, __U.S.__, 132 S. Ct. 1399 (2012); Strickland v. Washington, 466 U.S. 668 (1984).

281. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *10–12 (W.D. Wash. Dec. 4, 2013).

"best practices" to which attorneys and jurisdictions aspire.[282] This could be as simple as the language already existing in the certification requirement regarding Continuing Legal Education—clear, plain language that indicates attorneys are subject to suspension if they fail to comply with the Standards and certification requirements.[283]

The CLE requirement contains the language: "Any lawyer . . . who has not complied by the certification deadline . . . may be ordered suspended from the practice of law by the Supreme Court."[284] This Comment suggests the Standards include language along similar lines: "Any lawyer who has not complied with the Standards, or submitted certification to the court by the deadline, may be ordered suspended from the practice of law by the Supreme Court."

Second, a non-partisan public defense supervisor is likely to be successful in helping achieve the goals of the Standards. Researchers have agreed that independent supervision is a preferred method of improving the delivery of public defense services.[285] Rather than relying on the U.S. government to step in and provide this monitoring (as was previously done in Grant County),[286] the state OPD could be expanded to include this supervisory role. The OPD houses sufficient expertise regarding public defense, but also—as an extension of the judicial branch of government—the nonpartisan quality necessary to ensure fair and consistent quality across Washington's numerous jurisdictions.[287]

The need for such neutral, professional oversight is abundantly clear not only from the historic problems in implementing qualify public defense in the fifty years since the *Gideon* decision, but was also recently articulated by Judge Lasnik in the *Wilbur* decision:

> [T]he Court has grave doubts regarding the Cities' ability and political will to make the necessary changes on their own. The Cities [demonstrated an] unwillingness to accept that they had any duty to monitor the constitutional adequacy of representation provided by [their] public defenders . . . . [A]

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282. An unfortunate characterization of the Standards given in the *Wilbur* decision. *See Wilbur*, 2013 WL 6275319, at *5 n.4.

283. *See supra* Part IV.A.

284. APR 11.6(c).

285. *See* FAROLE & LANGTON, *supra* note 43, at 4 ("[T]he public defense function should be independent of undue political influence . . . a nonpartisan board should oversee defender systems.").

286. Statement of Interest for the United States at 7, *Wilbur*, 2013 WL 6275319.

287. *See* WASH. REV. CODE § 2.70.005 (2008).

declaration will not be sufficient to compel change.[288]

Where, as here, a constitutionally protected right is not met with political will to defend it, oversight by the nonpartisan judicial branch (specifically via the OPD, whose members are not elected) seems a natural choice. The *Wilbur* decision suggested the following duties be assigned to the Mount Vernon and Burlington public defense supervisor: monitoring client contact, using interpreters, using investigators, evaluating public defender communication with clients, and quarterly collecting fifteen randomly chosen files to assess the quality of defense being provided to clients.[289] This Comment suggests the Washington State Supreme Court should adopt Judge Lasnik's reasoning and charge the OPD with those oversight duties for every county in the state. This would require adequately funding the OPD to be able to hire the necessary staff to undertake this enhanced role.

1. Municipalities Should Engage in More Meaningful Case-Weighting of Various Criminal Charges

As mentioned previously, a handful of jurisdictions have already proposed plans to weight cases lightly, thus resisting a change to current structures while also bringing themselves in compliance with the new Standards.[290] In order to prevent jurisdictions from simply weighting cases too lightly in order to avoid complying with the Standards, the Court has already taken a reasonable step by requiring the OPD to conduct a time-study to determine what reasonable case weighting can and should look like.[291] Particularly in light of the decision in *Wilbur v. Mount Vernon*, jurisdictions should consider carefully the criteria for weighing cases rather than simply trying to weight cases in such a way as to squeeze heavier caseloads into compliance.

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288. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *9 (W.D. Wash. Dec. 4, 2013).

289. *Id.* at *10–12.

290. *See supra* Part IV.C.

291. *See supra* note 38. The Court recently issued another order requiring that jurisdictions conduct time studies in order to determine how misdemeanor cases should be weighted; the annual limits on caseload standards will thus become effective January 2015. The other requirements of the Standards must be certified to as of October 1, 2013. *Indigent Defense Implementation*, *supra* note 38.

B. Funding Must Be Located: A Continued Decriminalization of Non-Violent Misdemeanors Would Provide Numerous Financial Benefits

In order to hire enough public defenders to manage a criminal caseload, and especially if the Court considers tasking the OPD with an enhanced supervisory role, both the State and local governments will likely need to locate additional funding for its public defense delivery. This, however, is not an impossible feat. To begin with, savings can be located elsewhere in the criminal justice system by a continued decriminalization of certain infractions.

Jurisdictions can and should continue to decriminalize such minor, non-violent infractions as driving while license suspended. Such decriminalization would serve to ameliorate overburdened public defenders—and conserve limited resources—in three simple ways. First, though it seems obvious, the decriminalization of these crimes would mean fewer criminal cases would be charged and thus would serve as an instant reduction in public defender caseloads. Second, the savings that would trickle down throughout the criminal justice system—by reducing court time, incarceration costs, and law enforcement efforts—could benefit the remainder of the criminal justice system by enabling defense attorneys to devote more hours to their caseload regarding defendants facing other, more serious criminal charges. Third, revenue could be generated by transferring such crimes as Driving While License Suspended to a civil citation and a fine.

CONCLUSION

Despite the constitutional significance of a fair and effective public defender system, it is immensely difficult to gain political support for the rights of indigent defendants.[292] It may be for this reason that the Court—arguably in a stretch of its constitutional powers[293]—decided to act proactively to ensure that a poor person's right to a fair trial be honored by enacting the Standards for Indigent Defense. While it is a slow-moving process towards a change in social attitudes, increased empathy for accused persons would be monumentally helpful in ensuring that measures such as the Standards work effectively.

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292. Judge Stephen Warning notes, "It's tough to go to the Legislature and say people who are accused of crimes . . . need your help. . . . We can't exactly do a telethon for them." Armstrong & Mayo, *supra* note 25.

293. *See supra* Part II.B.

Similarly, the resistance of some defense attorneys—particularly those who have up until now represented defendants at least partially for profit[294]—needs to be re-examined. While the Standards represent what is, for some, a dramatic shift in their relationship to this work, they too represent an opportunity to demand reasonable and fair workloads for public defenders. Now is a chance for attorneys defending the indigent to demand fair compensation for a reasonable annual caseload, and for adequate assistance with associated costs such as hiring investigators, sharing an office, and securing conflict counsel.[295]

The Standards for Indigent Defense, like all structural changes, will require time and effort in order to be successful. Yet this time and effort—to be undertaken primarily by attorneys and local leaders—is more than an inconvenience. The Standards properly elevate poor defendants' needs over the professional concerns of attorneys. They seek, in one small yet significant way, to fulfill the promise begun with Clarence Gideon, that ours is a system in which "every defendant stands equal before the law"[296] and which ensures "substantial equality and fair process . . . where counsel acts in the role of an active advocate in behalf of his client."[297] Fifty years have passed since the United States Supreme Court recognized the right to assistance of counsel and required states to fulfill that need. As Judge Lasnik put it in the *Wilbur* decision, "The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right."[298] These Standards need not be the end of the world for attorneys who wish to meaningfully and effectively represent indigent defendants; indeed, they represent a new beginning.

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294. Those who worked under a contract as mentioned in Part I.

295. New York City public defenders were able to successfully strike to demand better conditions before the city's system was restructured. *See* Barge, *supra* note 175.

296. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). By extension, under the equal rights argument, a defendant's poverty cannot impede his right to a quality defense. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.").

297. Anders v. California, 386 U.S. 738, 744 (1967).

298. Wilbur v. City of Mount Vernon, No. C11-1100RSL, 2013 WL 6275319, at *23 (W.D. Wash. Dec. 4, 2013).